

IN THE  
**United States Circuit Court of Appeals  
For the Ninth Circuit**

JAMES C. DAVIS, as Agent of the  
Government of the United States  
of America (Substituted for John  
Barton Payne, Agent,  
*Plaintiff in Error.*

vs.

HARRIETT O. GOOD, as heir at law  
of HENRY M. GOOD, deceased,  
and HENRY MAX GOOD, a  
minor, by Harriett O. Good, his  
mother and legal representative,  
*Defendants in Error.*

**Transcript of the Record**

*Unit of Error to*  
Upon ~~Appeal from~~ the United States District Court  
for the District of Idaho, Southern Division.



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**Transcript of the Record**

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*Upon Appeal from the United States District Court  
for the District of Idaho, Southern Division.*

NAMES AND ADDRESSES OF ATTORNEYS  
OF RECORD:

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GEORGE H. SMITH,  
Salt Lake City, Utah.

JOHN O. MORAN,  
Pocatello, Idaho.

H. B. THOMPSON,  
Pocatello, Idaho.

*Attorneys for Plaintiff in Error.*

WALTERS, HODGIN & BAILEY,  
Twin Falls, Idaho.

C. C. CAVANAH,  
Boise, Idaho.

*Attorneys for Defendants in Error.*

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*In the District Court of the Fourth Judicial District  
of the State of Idaho, in and for the County  
of Elmore.*

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HARRIETT O. GOOD, as heir at law  
of Henry M. Good, deceased, and  
for and on behalf of Henry Max  
Good, a minor,

*Plaintiff,*

vs.

WALKER D. HINES, agent, and  
the OREGON SHORT LINE,  
RAILROAD COMPANY, a cor-  
poration, and E. L. GRIFFITH,

*Defendants.*

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COMPLAINT.

Comes now the Plaintiff, and for cause of action,  
alleges:

1. That the plaintiff Harriet O. Good is the widow and heir at law of Henry M. Good, deceased; that Henry Max Good is the minor son of the plaintiff, Harriet O. Good, and Henry M. Good, deceased; said Henry Max Good, being of the age of four years, and is one of the heirs at law of Henry M. Good, deceased. That plaintiff, Harriet O. Good, and Henry Max Good are the only heirs of Henry M. Good, deceased.

2. That the defendant, Walker D. Hines, is the agent appointed by the President under and by virtue of Section 206 "A" of an Act of Congress ap-

proved February 28th, 1920, entitled "An Act" to provide for the termination of Federal control of railroads and systems of transportation. That under and by virtue of the terms of said Act of Congress,—actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of possession, use, or operation by the President of the railroad or system of transportation of any carrier, may be brought against said agent.

3. That the defendant, Oregon Short Line Railroad Company, is a corporation organized and existing under and by virtue of the laws of the State of Utah; said railroad company has complied with the laws of the State of Idaho so as to entitle it to do business in said state.

Said defendant corporation is, and was, on the 11th day of January, 1920, engaged in the business of operating a railroad line through and across the State of Idaho; said railroad line extending from Granger, in the State of Wyoming, through and across the State of Idaho, to Huntington, in the State of Oregon.

That among others, said railroad line passes through the towns of Glens Ferry, Hammett, Medbury, and Mountain Home in said State of Idaho; that among other things, the business of said corporation consists in the transportation of freight and passengers over its said line. That for some

time prior thereto, and at the time of the accident hereinafter described, and until the first day of March, 1920, the defendant corporation was under Federal control, and was being operated by Walker D. Hines as Director General of Railroads, of the United States.

4. That the said defendant E. L. Griffith, at the time of the accident hereinafter described, was and now is, a citizen and resident of the State of Idaho, residing near the City of Caldwell, in the State of Idaho, and at the time of the accident hereinafter described was an employee of the defendant corporation, to-wit: Conductor,—on freight train extra No. 2010, west.

5. That on or about the 11th day of January, 1920, Henry M. Good, now deceased, was a lawful passenger on one of defendant's west bound trains, being Freight Train Extra No. 2010 West, running over and along the aforesaid line of railroad; that deceased was at the time, shipping two car loads of cattle over said line of railroad; that said two car loads of cattle were in said train and the deceased was riding in the caboose, which was attached to the rear of said train.

That while said train was being run over and along said line, a short distance west of Medbury Station, and while the deceased was a lawful passenger thereon,—said freight train extra No. 2010 west, became stalled, on what is commonly known

as Medbury Hill; that while said train was so stalled the defendants carelessly and negligently, caused said train to be cut into and carelessly and negligently, left, or caused to be left standing, on the track, a large number,—to-wit: about twenty-two (22) cars of said train; the defendants carelessly and negligently failed to set, or cause to be set, the hand brakes on the cars so left standing on the track.

That the cars so carelessly and negligently left standing upon which the defendants so carelessly and negligently failed to set or cause to be set, the hand brakes, ran back down the track and with great force, crashed into defendant's west bound passenger train, number seventeen (17), which was standing on the defendant's tracks near Medbury station,—completely wrecking and demolishing the caboose and several of the cars of said Extra Freight Train No. 2010.

That at the time of the collision, the deceased was a lawful passenger on said train number 2010, and was riding in the caboose, and by reason of aforesaid carelessness and negligence of the defendants, the deceased was instantly killed,—all of which took place in the County of Elmore, State of Idaho.

6. That the said Henry M. Good, deceased, was at the time of his death, thirty-eight (38) years of age, in good health, in possession of all his faculties,

and capable of earning four thousand dollars (\$4,000.00) per year.

That at the time of his death, deceased was the sole support of the plaintiffs herein.

7. That by reason of the carelessness and negligence of the defendants in carelessly and negligently causing the death of said Henry M. Good, these plaintiffs have been damaged in the sum of Seventy-five Thousand Dollars (\$75,000.00).

WHEREFORE, Plaintiff prays judgment of this Court against the defendants in the sum of SEVENTY-FIVE THOUSAND DOLLARS (\$75,000.00), and for their costs and disbursements herein.

WALTERS, HODGIN & BAILEY,

*Attorneys for Plaintiffs.*

Residence, Twin Falls, Idaho.

Certified by F. M. Hobbs, Clerk  
of State Court, and Filed Aug. 2,  
1920.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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DEMURRER.

Come now the defendants, Oregon Short Line Railroad Company and Walker D. Hines, Agent, and each for itself and himself separately and not

jointly, demurs to the complaint filed herein on the following grounds:

I.

That said complaint does not state facts sufficient to constitute a cause of action in favor of the plaintiff, for and on behalf of Henry Max Good, a minor, and against these defendants, either individually or jointly with the other defendants in said action.

II.

That there is a misjoinder of parties defendant in the joininng of Walker D. Hines, Agent, and the Oregon Short Line Railroad Company, in that said complaint does not state a joint cause of action against both of said defendants, and under the laws of the United States and executive and other orders made for and on behalf of the United States pursuant thereto, neither said Walker D. Hines or any other person as Agent of the United States is subject to suit on account of injuries sustained by any person on the lines of railroad of the said Oregon Short Line Railroad Company in those cases where, notwithstanding Federal control, said corporation may be sued, and if Walker D. Hines, Agent, was in the operation, management and control of said line of railroad, then the United States and its said Agent are solely liable, and the defendant, Oregon Short Line Railroad Company, is not liable therefor; that there is a misjoinder of parties defendant

in that said complaint does not state a cause of action in favor of the plaintiff, as heir at law of Henry M. Good, deceased, and for and on behalf of Henry Max Good, and against the defendant E. L. Griffith, either individually or jointly with the other defendants.

### III.

That said complaint is ambiguous, unintelligible or uncertain, in that in paragraph V thereof the acts complained of as constituting negligence are alleged to have been caused by the "defendants," and it can not be ascertained therefrom or elsewhere in said complaint upon what theory plaintiff claims both the defendant, Walker D. Hines, Agent, and the defendant, Oregon Short Line Railroad Company were engaged in the operation of said line of railroad, and the acts of commission and omission complained of, or upon what theory plaintiff joins both of said parties as defendants herein, or which of said defendants plaintiff claims, or will claim upon the trial, was operating said railroad at said time and place, the plaintiff having previously alleged in paragraph III of said complaint that the defendant corporation was operating said line of railroad at the time and place therein alleged, and if that be the fact and the Director General of Railroads was not operating said line of railroad at that time ( and it is nowhere previously alleged that he was) said paragraph III and paragraph V

of said complaint are incapable of reconciliation because of said ambiguity or uncertainty.

WHEREFORE, said defendants pray to be hence dismissed with their just costs and disbursements incurred herein.

GEORGE H. SMITH,  
H. B| THOMPSON,  
JNO. O. MORAN,  
*Attorneys for Defendants.*

Residence and postoffice  
address of H. B. Thompson  
and Jno O. Moran, Pocatello, Idaho.

Certified by F. M. Hobbs,  
Clerk of State Court, and  
Filed, Aug. 2, 1920,

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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## ORDER SUSTAINING DEMURRER.

### (MINUTE ENTRY)

At a stated term of the District Court of the United States for the District of Idaho, held at Boise, Idaho, on Monday, Sept. 13, 1920, the following proceedings, among others, were had to-wit:

Present, Hon. F. S. Dietrich, Judge.

Harriett O. Good, et al., )

vs. )

Civil No. 847.

Walker D. Hines, et al., )

The demurrer to the complaint was argued before the Court by counsel for the respective parties, whereupon, the Court announced his decision, sustaining the demurrer, and allowing the plaintiff sixty days in which to amend and take substitution of party agent.

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(Title of Court and Cause.)

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AMENDED COMPLAINT.

Come now the Plaintiffs, and for cause of action, allege, as follows:

1. That the plaintiff, Harriett O. Good, is the widow and heir at law of Henry M. Good, deceased; that Henry Max Good is the minor son of the plaintiff, Harriett O. Good, and Henry M. Good, deceased; said Henry Max Good, being of the age of four years, and is one of the heirs at law of Henry M. Good, deceased. That plaintiff, Harriett O. Good, and Henry Max Good, are the only heirs of Henry M. Good, deceased.

2. That the plaintiff Harriett O. Good is the duly appointed, qualified, and acting guardian of the said Henry Hax Good, and prosecutes this action on her own account as heir at law of said deceased, and for and on behalf of Henry Max Good, as the legal representative of said minor.

3. That the defendant, John Barton Payne, is the agent, appointed by the President, under and by virtue of Section 206-A, of an Act of Congress,

approved February 28th, 1920, entitled, "An Act," to provide for the termination of Federal Control of railroads and systems of transportation. That under and by virtue of the terms of said Act of Congress, actions at law, suits in equity, and proceedings in admiralty, based on causes of action arising out of possession, use, or operation, by the President of the Railroad or system of transportation, of any carrier, may be brought against said agent and this action is brought against the defendant in his capacity as agent of the Government of the United States of America, and not otherwise.

4. That long prior to the accident hereinafter described, the President, acting under authority of an Act of Congress, took over the control and operation of the railroad systems in the United States, including the Oregon Short Line Railroad Company's system, and duly appointed a Director General of Railroads, whose duty it was, to take charge of, control, and operate said railroads. That said Director General so appointed for the purpose of controlling and operating said systems of transportation, including the system of the Oregon Short Line Railroad Company, appointed certain agents, servants, and employees.

That prior to the commencement of this action, to-wit, on the first day of March, 1920, the President, acting under authority of an Act of Congress, approved February 28th, 1920, returned the rail-

road systems, including the system of the Oregon Short Line Railroad Company, to their respective owners, and ceased to control and operate said Oregon Short Line Railroad system from and after said first day of March, 1920.

5. That on the 11th day of January, 1920, and for some time prior thereto, Walker D. Hines, was the duly appointed, qualified and acting, Director General of Railroads, for the Government of the United States of America, and as such Director General, among other things, was engaged in the business of operating the railroad line, commonly known as the "Oregon Short Line,"—which said line runs through and across the State of Idaho.

That among other towns, said railroad line passes through the towns of Glens Ferry, Hammett, Medbury and Mountain Home, in said State of Idaho.

6. That on or about the 11th day of January, 1920, Henry M. Good, now deceased, was a lawful passenger on a train being operated by the agents, servants, and employees of the said Walker D. Hines, Director General of Railroads, being freight train extra, No. 2010 West, running over and along the aforesaid line of railroad.

That the deceased was at the time, shipping two carloads of cattle over said line of railroad; that said two carloads of cattle were in said train, and the deceased was riding in the caboose, which was

attached to the rear of said train. That while said train was by the agents, servants, and employees of the said Director General of Railroads, being run over and along said line a short distance west of Medbury Station, and while the deceased was a lawful passenger thereon, said freight train extra, No. 2010 west, became stalled on what is commonly known as "Medbury Hill."

That while said train was so stalled, the agents, servants, and employees of the said Director General, having charge of said train, or someone or all of them, carelessly and negligently caused said train to be cut in two, and the said agents, servants, and employees of the said Director General, having charge of said train, or some one, or all of them, carelessly and negligently left or caused to be left, standing on the track, a large number—to-wit, about twenty-two (22) cars of said train; that the said agents and servants, and employees, or some one or all of them, carelessly and negligently, failed to set, or cause to be set, the hand brakes on the cars so left standing on the track.

That the cars so carelessly and negligently left standing upon which the said agents, servants, and employees, or some one or all of them, so carelessly and negligently failed to set or cause to be set the hand brakes, ran back down the track, and with great force, crashed into west bound passenger train No. 17, which was standing on the tracks

near Medbury Station,—completely wrecking and demolishing the caboose and several of the cars of said extra freight train No. 2010 west.

That at the time of the collision, the deceased was a lawful passenger on said train No. 2010 west, and was riding in the caboose,—and by reason of the aforesaid carelessness and negligence of the agents, servants, employees, of the said Director General, or someone or all of them,—the deceased was instantly killed,—all of which took place, in the County of Elmore, State of Idaho.

7. That the said Henry M. Good, was at the time of his death, thirty-eight (38) years of age,—in good health,—in possession of all his faculties, and capable of earning four thousand dollars per year. That at the time of his death, deceased was the sole support of the plaintiffs herein.

8. That by reason of the carelessness and negligence of the agents, servants, and employees of the said Director General, or some one or all of them, in carelessly and negligently causing the death of the said Henry M. Good, these plaintiffs have been damaged in the sum of SEVENTY-FIVE THOUSAND DOLLARS,—(\$75,000.00).

WHEREFORE, Plaintiffs pray judgment of this Court, against the defendant, as the agent of the Government of the United States of America, in the sum of SEVENTY-FIVE THOUSAND DOL-

LARS, (\$75,000.00), and for their costs and disbursements herein.

WALTERS, HODGIN & BAILEY,

*Attorneys for Plaintiffs.*

Residing at Twin Falls, Idaho.

Endorsed: Filed Nov. 12, 1920.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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### ANSWER TO AMENDED COMPLAINT.

Comes now John Barton Payne, designated herein as agent of the Government of the United States of America, and for his answer to the amended complaint filed in the above entitled action admits, denies and alleges as follows:

#### I.

Admits that the plaintiff Harriett O. Good, is the widow of Henry M. Good, deceased, and that Henry Max Good is the minor son of the plaintiff Harriett O. Good and Henry M. Good, deceased, but defendant alleges he has not sufficient knowledge or information to form a belief as to whether the plaintiff Harriett O. Good, or said minor son Henry Max Good are heirs at law, or the only heirs at law of Henry M. Good, deceased, and on that ground denies such allegations.

II.

Alleges he has not sufficient knowledge or information to form a belief as to whether the plaintiff Harriett O. Good is the duly appointed, qualified or acting guardian of the said Henry Max Good, or prosecutes this action on her own account as heir at law of said deceased, or for or on behalf of Henry Max Good as the legal representative of said minor, and on that ground denies such allegations.

III.

Admits the allegations of paragraph 3 of said amended complaint.

IV.

Admits the allegations of paragraph 4 of said amended complaint.

V.

Admits the allegations of paragraph 5 of said amended complaint.

VI.

Answering paragraph 6 of said amended complaint defendant admits the allegations of the first and second subdivisions, excepting that defendant denies that said Henry M. Good, deceased, was a lawful passenger on said train according to the ordinary and usual meaning and acceptation of such term, and alleges he was a drover passenger; and denies that said train became stalled on what is commonly called Medbury Hill, although admitting that said train stopped at such point at the time alleged.

Further answering said paragraph 6, and the subdivisions thereof, defendant denies that while said train was stalled as alleged, or otherwise or at all, the agents, servants or employees or defendant having charge of said train, or someone or all or any or either of them, carelessly or negligently caused said train to be cut in two, or carelessly or negligently left or caused to be left standing on the track a large number or twenty-two, or any other number of cars of said train, or carelessly or negligently failed to set, or cause to be set, the hand brakes on such cars left standing as alleged; denies that any car or cars carelessly or negligently left standing, as alleged, or upon which said agents, servants or employees of defendant, or someone or all or any or either thereof, had carelessly or negligently failed to set or cause to be set the hand brakes, ran back down the track or with great force crashed into westbound passenger train No. 17, standing on the track near Medbury station, or completely wrecked or demolished the caboose or several of the cars of said freight train, although defendant admits that a certain number of cars of said freight train ran back down the track and crashed into said westbound passenger train No. 17, which was then moving backward in an effort to avoid a collision, and completely wrecked and demolished the caboose and several cars of said extra freight train, and instantly killed said deceased Henry M.

Good; admits that said deceased, at the time of said collision, was riding in the caboose as a drover passenger, but denies that he was a lawful passenger in any other sense, or that by reason of any carelessness or negligence of the agents, servants or employees of defendant, or someone or all or either thereof, as alleged anywhere in said complaint, said deceased was instantly killed.

#### VII.

Alleges that defendant has not sufficient knowledge or information to form a belief as to whether, at the time of his death, said Henry M. Good was thirty-eight years of age, or in good health, or in possession of all of his faculties, or capable of earning Four Thousand (\$4,000.00) Dollars per year, or was the sole support of plaintiffs herein, or either thereof, and on that ground denies such allegations.

#### VIII.

Denies that by reason of any carelessness or negligence of the agents, servants or employees of defendant, or someone or all or any or either of them, as alleged anywhere in said complaint, the death of said Henry M. Good was caused, or plaintiffs, or either thereof, have been damaged in the sum of Seventy-five Thousand (\$75,000.00) Dollars, or any other sum.

WHEREFORE, having fully answered the amended complaint herein, defendant prays to be

hence dismissed with his just costs and disbursements herein incurred.

(Duly verified):

Endorsed: Filed Nov. 16, 1920.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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VERDICT.

We, the jury in the above entitled cause, find for the plaintiffs and against the defendant, and assess the plaintiff's damages at \$21,250.00.

T. B. MARTIN,

*Foreman.*

Endorsed: Filed Feb. 25, 1921.

W. D. McREYNOLDS, Clerk U.S. Dist. Court.

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(Title of Court and Cause.)

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JUDGMENT ON VERDICT.

This cause came on regularly for trial. The parties appeared by their attorneys, Messrs. Walters & Hodgins and C. C. Cavanah, counsel for plaintiffs, and Geo. H. Smith, H. B. Thompson and Jno. O. Moran, esquires, for defendants. A jury of twelve persons was regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiffs and defendants were sworn and examined. After hearing the evidence, the arguments of counsel and instructions of the Court, the jury retired to consider of their verdict, and sub-

sequently returned into Court with the verdict, signed by the Foreman, and being called, answered to their names and say: "We, the jury in the above entitled cause, find for the plaintiffs, and against the defendant, and assess the plaintiffs' damages at \$21,250.00.

T. B. MARTIN, Foreman."

WHEREFORE, by virtue of the law, and by reason of the premises aforesaid, it is ORDERED AND ADJUDGED that said plaintiffs have and recover from said defendant the sum of Twenty-one Thousand Two Hundred Fifty Dollars (\$21,250.00), with interest thereon at seven per cent (7%) per annum from the date hereof until paid, together with plaintiffs' costs and disbursements incurred in this action, amounting to the sum of \$479.43, retaxed by the Court at \$451.73.

Dated this 26th day of February, 1921.

W. D. McREYNOLDS,

*Clerk*

Endorsed: Filed Feb. 26, 1921.

W. D. McREYNOLDS, Clerk U. S. District Court.

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(Title of Court and Cause.)

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### BILL OF EXCEPTIONS.

BE IT REMEMBERED that the trial of the above entitled cause came on the 24th day of February, 1921, at a stated term of the above entitled

Court begun and holding at Boise, Idaho, in said District, the Honorable F. S. Dietrich, District Judge, presiding, with a jury, Messrs. Walters & Hodgins and C. C. Cavanah, Esq., appearing as counsel for the plaintiff, and H. B. Thompson, Esq. appearing for the defendant, whereupon the following proceedings were had:

HARIETT O. GOOD, called as a witness on her own behalf, being first duly sworn, testified as follows:

I live on a farm four and a half miles north of Richfield, Idaho, and am the widow of Henry M. Good, now deceased. I have one child, a boy named Henry Max Good, five years old last November. I was married to Henry M. Good in Nelson, Nebraska, August 3, 1907, at which time Mr. Good was engaged in mining and so continued for between three and four years thereafter. Following our marriage we resided at Los Angeles, California and Reno, Nevada. About three years after our marriage Mr. Good became a traveling salesman and continued in such occupation for five or six years. After that we bought a ranch, consisting of eighty acres of unimproved land, at Richfield, and went there in 1916. In addition to that Mr. Good rented some adjoining land, which he also cultivated. He cleared the eighty acres of sage brush land which we purchased, and plowed and planted it in crop, and built a home and barn and

fences and all those things. Sometimes he bought and sold some livestock the last year of his lifetime. We were married twelve and a half years before his death, which occurred in January, 1920, at which time he was thirty-seven years old, and would have been thirty-eight years old April 29, 1920. During the time that he was a traveling salesman for Blake & McFall Company he received \$225.00 a month, and the last year he made a bonus of about \$400.00. Since my husband's death I have lived at Richfield, where I have taught school. I last saw my husband on the morning of Saturday, January 10, 1920, when he left Richfield, Idaho, with a carload of cattle for Portland, Oregon. The next time I saw him was the following Tuesday at Richfield, Idaho, at which time he was dead.

The witness was not present at the time of the train collision, in which Mr. Good came to his death, and did not undertake to testify as to any of its circumstances.

LILLIE DALE WYANT, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am the mother of Mrs. Good, the plaintiff in this action. I knew Henry M. Good a few years prior to his marriage and ever since, and lived with Mr. and Mrs. Good off and on for between seven and eight years. His conduct toward his wife and

son was always kind and good. He was industrious and his health was always very good. At the time of Mr. Good's death he owned eighty acres of irrigated land at Richfield, Idaho, situated about four and a half miles from the railroad station and stocked with cattle, hogs, and horses.

A. B. MATTSO, a witness produced on behalf of the plaintiff, being first duly sworn, testified as follows:

I am employed by the Oregon Short Line Railroad Company, and during the month of January, 1920, was employed as Station Agent on that line of railroad at Richfield, Idaho. Knew Henry M. Good in his lifetime, and on January 10, 1920, made a written contract with him for the transportation of carload of livestock from Richfield, Idaho, to Portland, Oregon, which is marked Plaintiff's Exhibit No. 1, and which bears the signature of Henry M. Good and also my name, which was affixed to the contract by the cashier at Richfield who was authorized to sign it. Didn't see Mr. Good get on the train in which his livestock left Richfield, but suppose he did. The shipment left Richfield on the afternoon of January 10, 1920.

J. L. FULLER, produced as a witness on behalf of the plaintiff, being first duly sworn, testified that he was Probate Judge for Lincoln County, Idaho, and produced a certified copy of the order appointing Mrs. Good guardian for Henry

Max Good, her minor son, and Letters of Guardianship.

E. L. GRIFFITH, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I have lived at Ontario, Oregon, for about four years, engaged in farming. In January, 1920, I was employed as conductor on the Oregon Short Line Railroad, and on January 10, 1920, was conductor on Extra freight train 2010 West, which I took charge of at Glenns Ferry at about ten o'clock P. M. The train consisted of fifty-five cars, one of which cars was loaded with cattle. There were three engines on the train; one road engine and two helpers to assist in hauling the train up Medbury hill. The train stopped on the hill and I got out of the caboose and went forward alongside of the train toward the head end, so that that part of the train might be taken to Chalk, which was the next siding. Cut the train in two, leaving about thirty-two cars standing on the main track. Did not set the hand brakes. Rode on the helper engine with the forward portion of the train to Chalk, and then came back to where the rear portion of the train had been left, but on arriving at that point the rear portion of the train which we had left standing there had gone. Thereupon I proceeded down the track ahead of the engine to a point where we found the wreck, where the hind end had collided with the

helper engine of train No. 17. Do not know the per cent of the grade, and do not know whether any hand brakes were set on the cars that were left standing on the hill. The weather was rather cold and clear, and the rails frosty. It was about a mile and a half from where the cars were left standing to the point of the wreck, it was down grade all the way. There were two men in the caboose who were accompanying livestock, one of whom was H. M. Good. I was employed as brakeman from 1911 to 1917. Had broke out of Glenns Ferry very little.

Question by plaintiff's counsel: I will ask you, Mr. Griffith, whether or not it would be necessary to set the hand brakes on the cars in order to hold them on the grade?

Mr. Thompson: I object that the witness hasn't qualified.

After some further examination the Court said: I am very clear, gentlemen, that this is a proper question. If it was shown that this witness had any particular experience in handling trains on this hill—You haven't shown what the custom was or is, perhaps was at the time. I think I shall have to sustain the objection in the present form, to the question in the present form.

Mr. Hodgin: Mr. Griffith, would those 32 cars have stood on that grade there without any brakes having been set?

Mr. Thompson: That is objected to upon the ground that the question is incompetent, and upon the ground that this witness is not qualified.

The Court: I shall sustain the objection.

Mr. Hodgin: You may cross-examine.

Mr. Thompson: There will be no cross examination.

Mr. Hodgin: You may state if you know what these men were doing in the caboose when you left them?

(a) Supposingly they were asleep. One was lying on the cushion and the other was laying on the stretcher on the floor—I did not disturb or call them or tell them the train was stopped.

OWEN COFFELT, produced as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Am 26 years old and have lived in Glenns Ferry, Idaho, all my life. Was employed on the Oregon Short Line Railroad as a brakeman during the month of January, 1920, and on the 10th day of that month was called for ten o'clock P. M. to go out on freight train Extra 2010 West, and went west on that train as rear brakeman. The train stopped near a siding called Chalk, which is about half way up Medbury hill, and I went back to flag train No. 17. After I got back down the track about half a mile the hind portion of the freight train passed me and backed on down into the helper en-

gine on passenger train No. 17. There were two men asleep in the caboose when I left, which was almost immediately after the train stopped. I did not set any hand brakes on the train. I do not know whether anyone else did. Do not know the per cent of grade. There were two helper engines on westbound train 2010 and one road engine.

Mr. Hodgins: You may state whether or not it was necessary to set brakes on those 32 cars in order to hold them on the grade.

Mr. Thompson: I object to that question as incompetent, and outside the issues, and that this witness has not qualified to answer the question, no proper foundation laid.

The Court: Sustained.

Q. What was the condition of the grade at the point where the train stopped, Mr. Coffelt, with reference to being uniform or steep or otherwise?

A. It was on a curve. I don't know what the per cent of the grade was, I couldn't say, but it was up hill.

Q. Mr. Coffelt, you may state, if you know, whether or not it was customary when freight trains stopped on Medbury hill at Chalk or at the point where westbound 2010 stopped that morning, to apply the brakes.

Mr. Thompson: I object to that upon the ground that it assumes that the witness knows, and upon

the ground that it is not limited to the point in question involved in this case.

The Court: Do you know what the custom was when trains stopped at that particular point, that is, at Chalk siding, where this train stopped on that occasion? Was there any custom? If so, you may state what it was.

A. There is a custom. It all depends upon what—

The Court: As to the use of the brakes?

Mr. Thompson: May I inquire first of the witness?

The Court: Yes. Was there a custom, to your knowledge?

A. There was.

The Court: Were cars sometimes set out there, cars detached from the train and set out at that point?

A. At Chalk I suppose there is.

The Court: I am asking you what you know about it. Were you ever on a train at any other time when it stopped at this point and the engine was cut off?

A. Yes, once.

Mr. Thompson: Now I submit that this witness cannot establish a custom by a single experience, and for that reason I object that he is not qualified.

Mr. Hodgkin: I think the weight is for the jury.

The Court: No. Of course one instance wouldn't

establish custom, but it might be that he would know something more about it than this particular incident. I really don't like to examine this witness myself, gentlemen. I prefer to have you do it,—to see what he knows about it by way of observation or experience there.

Continuing the witness testified:

I would judge that the grade is about the steepest, close to it, but couldn't say for sure. There is no grade between Glenns Ferry and Huntington that is as steep as Medbury hill. It always requires helpers to draw a train up the grade. The helpers cut off and turn back at reverse, which is at the top of the hill and approximately eight and a half miles from Medbury station.

Mr. Hodgin: You may state if you know what would have prevented the cars that were left standing on the track without an engine, what should have been done to prevent them from running back.

Mr. Thompson: That is objected to as being away without any issue in the case, and as irrelevant, incompetent and immaterial, and no proper foundation laid, and this witness not qualified. The sole issue here is that the brakes had not been set.

Mr. Hodgin: We have proven that the hand brakes were not set, Your Honor.

Mr. Thompson: What more do you propose to prove then, let me ask?

Mr. Hodgkin: Mr. Thompson, if you want to argue this matter, if you will address yourself to the Court I can get along better. We have proven that the hand brakes were not set. The charge is negligence in no setting the hand brakes. I am trying to find out from this witness, if he knows, and I think Your Honor appreciates this situation—we are necessarily compelled to call the employes of the other party here, in order to prove these facts, and I think the young man is trying to answer the questions fairly and honestly, but it is difficult for us. Now if he has had certain experience on that hill, three and a half months, I think we ought to be entitled to show by him what was necessary to be done in order to hold that train where it was left on that track. The weight of his testimony is for the jury, to be judged by his experience, as to whether or not he had sufficient experience to be able to judge absolutely or not, is for the jury, in my view of the matter, and we think we ought to be permitted to ask this question.

Mr. Thompson: And I submit, if the Court please, that this is broadening the issues and going away beyond what we are here on. Plaintiff's counsel has stated what was necessary, and he says this witness has answered whether that was done or not, and that is all within the issues, and certainly anything further is without the issues, and counsel has stated that he has asked him the only question

within the issues, and hence I renew my objection, that this is without the issues, and incompetent, irrelevant and immaterial.

Mr. Walters: This must be true, Your Honor, that something should have been done to have prevented the cars from backing down the grade. Whatever that something was that should have been done is the thing that we must prove in order to maintain our action. It isn't apparent that it would take a person with long experience or expert knowledge perhaps, to tell whether or not a freight car would back down the grade or stand still; it would be rather elemental as to what should have been done to have prevented that. That is the sole question here,—what would have prevented the cars from backing down the hill. That we think we must prove. If our friend says no, we need not prove it, I think of course it is quite simplified, but I think he hardly means it the way I understand it.

The Court: The difficulty about the proposition is, you are assuming that it is a matter of elementary knowledge that the cars wouldn't stand there. If that be true, of course you wouldn't need any expert testimony on that point. If you can show by this witness that there was a grade at this particular point, and I think perhaps he has already testified that the track was not level—

Mr. Hodgins: I think, Your Honor, he testified that it was the steepest part of Medbury hill.

The Court: I think I will let you ask him the question whether or not—that will be for the consideration of the jury—You may permit him to answer whether or not cars detached from an engine and without the hand brakes being set would have stood at that point, or whether they would have gone backwards of their own accord.

Mr. Hodgins: I was just coming to ask that question.

The Court: You may ask the question, and I will hear you, Mr. Thompson.

Mr. Hodgins: Mr. Coffelt, based upon your knowledge of the grade at that point where this particular train stopped and your experience as a brakeman, I will ask you whether or not cars, 32 cars, freight cars, detached from the train, would stand on that grade at that point without the brakes being set?

The Court: Just a moment, before you answer.

Mr. Thompson: I object that no proper foundation has been laid, that there is no assumption of facts in the question which purport to be the facts surrounding the circumstances involved in this case, that this witness has not qualified himself to answer, and that this question is irrelevant and outside of any issue in the case. This witness doesn't purport to know or have experience or be

qualified and he doesn't claim ever to have tried anything that he can testify on the subject. I submit, Your Honor, it is a mere conclusion that he would undertake to testify to. That goes to the foundation now, clearly. Has he ever seen it tried, or tried it? If he has, I grant you probably he is qualified, and if not, they are simply trying to get this witness to reflect that which Judge Walters says is so simple, that is to say, they are asking him only for his conclusion and not anything that this witness is qualified by any observation or experience to testify about.

The Court: The objection is overruled.

Mr. Thompson: Save an exception.

(Last Question read).

Mr. Thompson: You are speaking of hand brakes, Mr. Hodgin?

Mr. Hodgin: Yes, hand brakes.

A. Yes, they would stand with a sufficient number of hand brakes.

Q. Well, if no hand brakes were set would the cars stand at that particular point?

A. At that time I would be incapable of answering that question.

Q. Those cars didn't stand at that point, did they?

The Court: The cars went backward for some reason. That is obvious.

Mr. Hodgin: Do you know what caused the cars to run backwards?

A. I couldn't say.

M. A. RICKS, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I am a locomotive engineer residing at Glenns Ferry, Idaho. Have been an engineer eight years, employed on the Oregon Short Line Railroad. On January 10, 1920, left Glenns Ferry on the leading engine, which was the road engine, with a train Extra 2010. At that time had been running trains over Medbury hill in the neighborhood of two years. The train stalled on the hill. It stopped—could not pull it. Do not know why. I had in that train 55 cars. When we stopped I whistled out a flagman by giving one long and three short whistles, and stood there for five or six minutes and pulled up to Chalk. Conductor Griffith was in charge of the train which was cut in two. One engine was left at Chalk siding and my engine and another one went back down the hill. Do not know whether any brakes were set on the cars left standing on the grade, which with the exception of one mile, is about the same as it is any part of the hill and steeper than the rest of the road, except that there are other grades on the hill just as steep at this point. Had never before stopped on Medbury hill. Don't know of any custom with reference to setting hand brakes on a freight train stop-

ping on a grade, except that either hand brakes or air brakes should be applied on a hill to hold the train from running back. When the train is cut in two and the air brakes are not applied, it is then customary to set hand brakes.

Q. I will ask you whether or not it was necessary to set the hand brakes on those 32 cars in order to hold them on that grade.

Mr. Thompson: I object to that on the ground that this witness hasn't shown himself qualified; there is no proper foundation and it is incompetent, irrelevant and immaterial. This witness says, I think, that he has never stopped on this hill before.

The Court: I think I will permit you to ask him this question, as to whether or not in his judgment it was necessary to have brakes of some kind applied to hold the cut-off cars at that point.

Mr. Hodgin: I will ask you, Mr. Ricks, whether or not in your judgment it was necessary to have some kind of brakes applied on those cars that were cut off from the train, in order to hold them on the track?

Mr. Thompson: The same objection.

The Court: Overruled.

Mr. Thompson: An exception.

A. Yes, it was necessary to set brakes.

Mr. Hodgin: Were the brakes applied on those cars, if you know?

A. I don't know.

Q. When the train was cut in two, that cut the air brakes off, did it not?

A. It cut the train line but not the brakes.

This train was equipped with air brakes which were handled from the leading engine, and I was handling the air on the train until the train was parted. When the train is cut in two I have no control beyond where it is cut off.

The Court: What is the effect of cutting the train in two, so far as the air brakes are concerned on the cut-off portion of the train?

A. It allows the air to escape and the brakes apply on the portion that is cut off.

The Court: When the train is cut in two the air brakes are automatically applied to the cut-off portion?

A. Automatically applied. I have known cars to hold air for three days.

Mr. Hodgins: What would be the effect on these cars if the air should give way on one car, if the air should leak out on one car, what would be the effect on the others standing on that grade?

Mr. Thompson: I object that that is incompetent, irrelevant and immaterial, and outside of any issue in the case, and this witness is not qualified.

Objection overruled and exception saved.

A. It would allow one car to start.

The Court: You mean when one car starts it simply releases the brakes on the others?

A. On that car.

Mr. Hodgin: What effect would it have on the other cars, if that occurred?

The Court: That is, if it would have any.

Mr. Thompson: That is objected to as incompetent, irrelevant, and immaterial, and outside of any issue in the case.

The Court: Is this the negligence you allege?

Mr. Hodgin: Yes, Your Honor. No, Your Honor, we allege that the negligence consists of failing to set the hand brakes, and we want to show by this witness that if the air leaked out of one car and it struck the other car,—there is some slack in there,—and it struck the other car, what would be the result on those others, even though the air was on,—show that it is necessary to set the hand brakes. That is what this evidence goes to, and Your Honor will appreciate our situation with these witnesses.

The Court: No, I can't say that I appreciate your position. I don't know just what you mean, Mr. Hodgin. You have stated several times that the court must appreciate your position. Now it was possible for you to get a witness to show precisely what this grade was, without resorting to railroad employes, and it would have been entirely possible for you to have brought witnesses who

might be competent to testify as to whether or not railroad cars standing without the application of any brakes would run back on a grade of that kind. Now, of course, as to just how far this witness is competent to answer some of the questions you are asking it is very difficult to say. You suggest that there must have been some slack. That is an assumption that I think is not necessarily true.

Mr. Hodgin: Well, I will ask the witness. He can tell us.

The Court: Yes, ask him any question that he knows, anything about.

Mr. Hodgin: Mr. Ricks, you may state what is the relation of freight cars when they are coupled together in a train, with reference to their being tight or some slack?

A. Ahead of the helpers there won't be any slack, ahead of the helpers.

Q. How about behind the helpers?

A. Behind the helpers it varies.

Q. Can you state the amount of the slack?

A. No, I can't.

Q. Can you give us any figure as to the slack between the cars behind the helpers?

Mr. Thompson: Just a moment. I submit that this is outside of any issue in the case, and calls for speculation or conjecture on the part of the witness, and not anything that he knows of. And while we are on that, I have assumed that the

court, who has shown already that he is quite as familiar with the pleadings as some of counsel, I have assumed that the court would appreciate the limitation of the issues here, and I call attention to the third paragraph of the sub-division numbered six. There are the sole averments of negligence, and that is the only issue with which I am charged, and the only issue that I have been called upon to meet. Now counsel are going outside of anything that I feel that I have been required to anticipate or to meet, and it is upon that ground that I have been interposing the objections that I have. And with this statement I hope the record may be clear and the court will understand my position. I object to anything except proof of what is pleaded in sub-division six, and I concede that everything complained of with reference to the management of the train is pleaded in the third paragraph of that sub-division.

The Court: I understand counsel's objection. I think I shall have to overrule the general objection that the plaintiff cannot go into this matter of hand brakes. As I understand, the particular charge of negligence is that the hand brakes were not set. Now the plaintiff is trying to show that it was necessary, under the circumstances there, to set or use the hand brakes, and this particular evidence is to that point; in other words, that the hand brakes ought to have been set, if they weren't set.

He is trying to show that the train would not stand there without the application of brakes, and that it was not sufficient to rely upon the use or the automatic application of the air brakes, and that hence it was negligence not to use the hand brakes. Now just what the facts may be as to the air brakes is not very clear as yet.

Mr. Thompson: Of course I regret that the court takes that view of it, because, as I have said, they certainly have not charged that it was necessary to do anything but to set the hand brakes. They said that that was necessary, and not done, and I don't make this statement by way of argument to the court, but simply as to the subject, that I may stand properly upon the record.

Mr. Hodgin: I will ask you this question, Mr. Ricks. If the air failed to work on those cars left standing on the grade there, would they stand without the setting of the hand brakes?

Mr. Thompson: Of course I will have to protect my record under this theory. If we can safely have a standing objection to all testimony with reference to air brakes or what air brakes would do or would not do, and all matters beyond the application of hand brakes, and whether they were or were not set, I will save, if court and counsel desires, an objection and exception to all testimony with reference to air brakes, and what they would do or would not do, and what was done or was not

done, if anything, in that respect, outside of hand brakes.

The Court: That may be understood, so far as the objection of relevancy or materiality is concerned. I shall expect you to make any objection to the competency as to each particular question, because I can't anticipate what they are going to ask.

Mr. Thompson: Yes.

Mr. Hodgins: Now will you read the question, Mr. Reporter.

(Question read).

Mr. Thompson: Just a moment. I object that that is not an expert question.

The Court: Overruled.

Mr. Thompson: It calls for the conclusion or opinion of the witness.

The Court: Objection overruled.

Mr. Thompson: Save an exception.

The Court: You may answer.

Witness: The question was—

The Court: The question is, whether the cars would stand there really without any brakes applied.

A. Well, being as I never tried it, it is hard for me to tell.

The Court: No,—but in your judgment—that is the question.

A. No, I hardly think they would, that is, if no brakes were applied.

The Court: If no brakes at all were applied, either hand or air?

Mr. Hodgin: What was the condition of the weather that morning, Mr. Ricks?

A. Cold.

Q. What was the condition of the rails?

A. Frosty.

Q. Would that have any effect on cars standing on the track?

A. No.

Q. Would it have any effect on your ability to pull the train?

A. No.

Q. It would not?

A. No.

DAN SULLIVAN, a witness for the plaintiff, being first duly sworn, testified as follows:

Am a locomotive engineer and have lived at Glenns Ferry, Idaho, for about two and a half years. On the night of January 10, 1920, went out from Glenns Ferry with a light engine to help freight train 2010 over Medbury hill. This train stalled on the hill a mile east of Chalk. It was steep but not the steepest part of the hill. We were over the steepest part of the hill. The train was cut in two and 33 or 34 cars left standing on the track. Those cars backed down the hill and collided with 17. The

air brakes were set on these cars. Do not know whether hand brakes were set.

Q. You may state whether or not, if the air brakes on those 33 or 34 cars failed, whether they would have stood on the track where they were left.

Mr. Thompson: That is objected to as not being an expert question.

The Court: Sustained.

Mr. Hodgins: You may state whether or not, if no brakes at all were set on those cars, would they have stood where they were left?

A. No; if neither hand brakes nor automatic brakes were set, they wouldn't have stood.

Do not know of any custom with reference to setting brakes on Medbury hill on the portion of the train left standing on the track. Went with the front end of the train up to Chalk and returned again to the point where the cars had been left standing on the track, which consumed about twenty minutes, and upon arrival at such point the cars were gone.

Mr. Hodgins: You may state, if you know, why those cars ran away down the bill.

A. No. I don't know.

B. F. SMITH, a witness for the plaintiff, being first duly sworn, testified as follows:

Have been a locomotive engineer for 25 years and reside at Glens Ferry, Idaho. Have run an

engine over Medbury hill off and on for the last 11 years. On the evening of January 10, 1920, and the early morning of January 11, 1920, was helping passenger train 17 at the time of the accident. We left Medbury on seventeen and ran against a red block on the hill and stopped, and as we were standing there the rear portion of a freight train came down and ran into us.

Mr. Hodgins: I want to prove that this contract of shipment was in Mr. Good's effects.

Mr. Thompson: You wish to establish that, and then offer it in evidence, do you?

Mr. Hodgins: Yes.

Mr. Thompson: We will agree that that was so, then, and that it may be received in evidence.

Contract was offered in evidence as plaintiff's Exhibit No. 1, and by the Court received.

Q. What is the condition of the grade at as near Chalk with reference to the balance of Medbury hill?

A. It is not as steep as the rest of the hill.

Q. Is it steep or is it a grade?

A. Oh no, it is a grade.

I will ask you if 33 or 34 freight cars were cut off and left standing without an engine, it would be necessary to set the hand brakes in order to hold them on the grade at that point.

A. I couldn't say.

Q. I will ask you whether or not, if 33 or 34 freight cars were cut off and left standing on the grade at that point, and no brakes were set at all, would they remain standing?

A. I don't think they would. During my experience I have pulled several hundred trains up Medbury hill and possibly as many down Medbury hill. Have always had occasion to apply the brakes going down hill, and it has never been necessary in my experience to set the hand brakes going down the hill, because the air brakes always did all of it.

Q. If the air brakes failed to work, would it be necessary to set hand brakes?

MR. THOMPSON: I object to that as calling for a mere conclusion and deduction of the witness, and not an expert opinion.

Objection overruled and exception allowed.

A. Yes, sir.

MR. HODGIN: Then if 33 or 34 freight cars were left standing on Medbury hill at or near Chalk siding, and the air on them failed to work—I will put it this way—would it be necessary to set the hand brakes in order to hold them on the grade?

Question objected to and objection sustained.

MR. HODGIN: I think the question he answered, Your Honor, was, if no brakes were set, my recollection of it. I may be wrong about it.

THE COURT: I understand this question to be the same. If the air failed to work and the hand brakes were not set then there would be no brakes.

MR. HODGIN: Yes, that is true. That is all.

MR. THOMPSON: That is all.

MR. HODGIN: If the Court please, we have finished with that branch of the testimony, and we will start with another branch of it, after the noon recess.

GEORGE SCHWANER, a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

I reside at Richfield, Idaho, and have been employed in the First State Bank at that place since September 1, 1910. Was acquainted with Henry M. Good during his lifetime, since some time in 1916. His business was principally farming and he did business with my bank in 1918 and 1919. His cream checks and grain checks for the year 1918 totalled \$2308.93, and for the year 1919 \$2388.25. I cannot say from my own personal knowledge where the cream came from, and that is also true of the grain.

J. H. LANE, a witness for the plaintiff, being first duly sworn, testified as follows:

I have resided at Richfield, Idaho, since 1904, and engaged in the farming and sheep business, and was acquainted with Henry M. Good for about four years. Was acquainted with the extent of his farming operations, which consisted of raising grain and hay and mostly wheat, with some dairying and hog feeding. His health was good, and he was an efficient farmer. The going wages for

farm labor in 1918-1919 was from \$100.00 to \$150.00 a month and board. The price of farm labor has been a somewhat fluctuating thing of recent years, and has been reduced within the past year or six months, and labor is easier to get now than a year ago. Within the past six months the wages of farm laborers or sheep laborers has been reduced approximately thirty per cent. The wages of foreman has been more and they are not subject to much fluctuation as common farm labor.

HENRY FULLBRIGHT, a witness for the plaintiff, being first duly sworn, testified as follows:

I am a farmer and have resided about three and a quarter miles east of Richfield since 1910, and was neighbor to Henry M. Good and knew him in his lifetime. He was a good farmer; condition of his farm was exceedingly good. He raised wheat and alfalfa and engaged some in dairying and hog raising. His crops in 1916 and 1917 were average crops, but in 1918 and 1919 they suffered some because of water shortage. Ordinary farm labor in 1918-1919 received from \$100.00 to \$150.00 a month and board in the summertime. There are very few that work the year around.

Plaintiff's counsel offered in evidence the American Mortality Table, based on American experience, contained in Volume 20 of the American Encyclopedia of Law, Second Edition, at page 885, showing the expectancy of life of a person 38 years

of age to be, according to that Table 29.62 years.

A. L. FLETCHER, a witness for the plaintiff, being first duly sworn, testified as follows:

Prior to December, 1920, I resided at Richfield, Idaho, and resided there in January, 1920. Am Attorney at Law. Knew Henry M. Good in his lifetime, and about the middle of January, 1920, Mrs. Good employed me to present claim and protect her interests and do whatever seemed proper in the matter. I forwarded duplicate copies by Registered mail with request for return receipt papers marked Plaintiff's Exhibits Nos. 6 and 7. Upon mailing the papers I received from the Postmaster Plaintiff's Exhibits Nos. 3 and 4, being Registry receipts. The paper marked Plaintiff's Exhibit 5 is the receipt for Registered letter sent to the General Manager of the Oregon Short Line Railway Company at Salt Lake City, Utah. Exhibit No. 6, is the return receipt for the letter sent to Mr. Hines, the Director General of Railways. Plaintiff's Exhibit No. 7 is a carbon copy of the claim. As far as I am able to say, the subscription on the envelopes correspond to that appearing on the receipts of the Postmaster.

The exhibits were offered in evidence and the following objections made thereto:

MR. THOMPSON: The defendant objects to the offers, first, with reference to the receipt numbered—first with reference to the receipt numbered—first with reference to Plaintiff's Exhibit

No. 4, purporting to be for a letter addressed to Walter D. Hines, Washington, D. C., and the receipt purporting to be Plaintiff's Exhibit No. 6 and bearing the words in ink, "W. D. Hines," name of addressee, and on the line "Signature of addressee's agent, "B. Wilsar," upon the ground that those two exhibits are irrelevant and immaterial, and do not establish the mailing of a notice to or the receipt of a notice by Walker D. Hines, or Walker D. Hines, Director General of Railroads, or by the Director General of Railroads of the United States. The defendant also objects to the introduction of Plaintiff's Exhibit No. 5, upon the ground that that is directed to General Manager O. S. L., Salt Lake, Utah, and although it is a registry receipt, with request for return receipt desired, and as we know in the ordinary course of events, if it was delivered, the return receipt would be had, and no return receipt is shown to have been issued, and the delivery in the usual course of registered mail not proven, and that it is irrelevant and immaterial that such a notice was sent to the General Manager of the O. S. L. at Salt Lake City, Utah, or elsewhere. And defendant objects to Plaintiff's Exhibit No. 7 as being introduced in evidence, upon the ground that it is not shown by the evidence—

WITNESS: I don't like to interrupt there, but, if the Court would permit me, I would like to modify an answer I have made.

MR. THOMPSON: After I am through, Mr. Fletcher.

And that such claim or purported claim was ever delivered to or received by the General Manager of the carrier, either within thirty days after the accident or injury, or at all. And objects to the general introduction of that exhibit upon the ground that it is self-serving, and embraces a series of self-serving declarations, incompetent, and improper to be submitted to the jury, and upon the final ground that neither of said exhibits prove such presentation of claim to the General Manager of the carrier within thirty days after the occurrence of the injury.

THE COURT: You say you desire to correct your answer in part? You may do so now, sir.

A. The claim sent to the Short Line was addressed to the General Manager of the Oregon Short Line, and in that respect the address on the envelope varied from the receipt. The Postmaster has used the initials, because, the receipt wouldn't contain the full name. That is the exception I wish to make.

Mr. Thompson: Then that one that you say was sent to the General Manager of the Oregon Short Line was addressed how?

A. General Manager, Oregon Short Line Railway Company, Salt Lake City, Utah.

MR. THOMPSON: Then I renew my objection upon the same grounds, and upon the further

ground that a notice to the General Manager of the Oregon Short Line Railway Company was not a notice to the General Manager of the defendant carrier then in charge of the operation of the railroad.

THE COURT: The objections will be overruled.

MR. THOMPSON: We will save an exception.

MR. HODGIN: The exhibits will be admitted, Your Honor?

THE COURT: Yes.

MR. HODGIN: And be read to the jury now or later on?

THE COURT: Well, unless it is waived, they should be read at the present time. When you offer to read the claim to the jury I will say to the jury that it is merely showing your compliance with the contract, and they are not to consider any statement made therein as evidence of the fact.

MR. HODGIN: We don't care to waive any rights, but we don't care to read the claim unless it is necessary to do that.

MR. THOMPSON: Can it not be agreed then, without waiving the rights of either party, and saving the objections and exceptions which I have to Plaintiff's Exhibit 7, that Plaintiff's Exhibit No. 7 is for the Court to say whether as a matter of law the condition of the contract was performed, and is not for the jury anyhow.

THE COURT: Very well.

MR. HODGIN: Yes.

MR. HODGIN: Then I take it is not necessary to read these—

THE COURT: It is not necessary then, in view of that understanding, to read them to the jury.

Plaintiff's counsel then stated that they rested, whereupon defendant's counsel announced that the defendant rested, and moved the Court for a directed verdict in favor of the defendant, and a dismissal of the action as follows:

MR. THOMPSON: The defendant, by its counsel, after the plaintiff and defendant have rested, respectively, moves the Court for a directed verdict in favor of the defendant and a dismissal of the action, upon the following grounds:

1. Because by the plaintiff's proof it has been made to appear that at the time of the collision which constitutes the basis of this action or out of which the plaintiff's claim has arisen, Henry M. Good was riding on a shipping contract or agreement with the carrier, which provided what claim in writing should be presented to the General Manager of the carrier on whose line it occurred, and unless such notice should be given within thirty days after the date of the accident or injury, no claim for personal injury should be valid or enforceable, and that it does not appear from the evidence that any claim in writing was given within thirty days to any person who was general manager of the United States Railroad Administration in charge of the railroad operation.

2. The defendant bases its motion upon the ground that the plaintiff's right of action is based upon the averments of the complaint that the train on which the plaintiff was riding had become stalled on a grade, and that while said train was so stalled the agents, servants and employes of said Director General having charge of said train, or some or all of them, carelessly and negligently caused said train to be cut in two, and the said agents, servants and employes of said Director General having charge of said train, or someone or all of them, carelessly and negligently left or caused to be left standing on the track a large number, to-wit, about 22 cars of said train; that the said agents and servants and employes, or some one or all of them, carelessly and negligently failed to set, or cause to be set, the hand brakes on the cars so left standing on the track, the negligence alleged to have been the cause of the injury being that the defendant, through its agents and servants, failed to set the hand brakes on the cars, and that the collision or the escape of the cars was thereby caused, but that the plaintiff has failed to prove this. And the plaintiff has failed to offer sufficient proof to support a verdict of the jury that Henry M. Good came to his death in consequence of the failure of the defendant, through its agents and servants, or otherwise, to set the hand brakes, as complained of, or at all, or that the collision was caused or the escape of the cars, and the

death of Henry M. Good, by any act of negligence of the defendant alleged in the complaint.

It appears to me that the case has been tried on the theory that the doctrine of *res ipsa loquitur* applies, which it does not, because the particular cause and manner of the accident has been alleged, and the plaintiff has assumed the burden and been under the obligation of proving it. All that the proof shows is this, that the train was stopped on the track at a point near Chalk, that it was cut in two, and that the air brakes were set on the train, Engineer Sullivan testifies. It is not shown that in the ordinary course of events that would not be ample precaution for the protection of the train and for holding it on the hill, the only evidence on that subject being that of Engineer Ricks, that air would sometimes hold for as much as two or three days. The testimony of Engineer Sullivan is that from the time that his engine was cut off from the cars to the time he returned to where they had been did not exceed twenty minutes, and there is no proof whatsoever that independent and apart from hand brakes the air brakes should not in the ordinary course of events and in the exercise of ordinary care have held that train for far in excess of twenty minutes or two or three hours or two or three days. The situation is then merely this, that they show, it is quite true, that hand brakes were not set; also it does not appear that the train was not chained to the rails, let us say, and many other

things done; but it is not shown that the exercise of reasonable care for the holding of the train demanded that the hand brakes be set. That is the situation. The plaintiff is under the burden of establishing that. The plaintiff even undertook to establish that, and in that they have wholly failed, I submit.

MR. HODGIN: If the Court please, our position is simply this: that negligence is the omission of some act of the defendant here which it owed to the deceased in that particular situation. Now the proof shows that the hand brakes, and counsel admits that the hand brakes were not set. There was the omission of an act that, under due care, could have been exercised. That was a duty owed to the deceased, to set those hand brakes. It is true that the evidence shows that when the train was cut in two ordinarily the air brakes set themselves, but there is no evidence here that they did set themselves in that instance. Nobody examined the train apparently. But however, the fact remains that those cars ran away; that is admitted by the defendants. And it is in evidence I think by one of the witnesses that if the hand brakes, enough of them, had been set, it would have held those cars on the track. It seems to me that that tells the whole story, except this, that if, as I understand the rule, if there is evidence tending to show negligence on the part of the defendant or his agents or servants here, then that evidence, that is a question

of fact to go to the jury. If there is some evidence tending to show negligence, then it should not be taken away by the Court, but should be submitted to the jury, under proper instructions, to be determined as any other fact in the case is determined. We think that is a complete answer to counsel's statement. He admits that the brakes were not set, and that we have proven that. You admit that in your argument. He admits—

MR. THOMPSON: The hand brakes, you mean?

MR. HODGIN: Yes, the hand brakes were not set, that is what I mean. It is admitted that the cars ran away, and that by reason of the cars running away the deceased was killed. There are sufficient facts to send this case to the jury, there is no question in my mind about it.

One other question with reference to the notice. Counsel hasn't argued that. The exhibits introduced show that the notices were mailed on February 2nd and—I think it is Exhibits 4 and 5,—the accident occurring, according to the evidence, on January 11th, and that would be within thirty days.

MR. THOMPSON: The evidence shows that the escape of the cars directly came about by the air brakes failing. There is no issue of failure to properly inspect the air brakes or of failure to use reasonable foresight and care in maintaining the air brakes, and there is no evidence that the air brakes would not have held the train ordinarily or at all.

Hence there is no evidence that setting of hand brakes was necessary, but over and beyond that, it was not shown by the evidence that it was either customary or necessary to set hand brakes in addition to air brakes being set, or that ordinarily the air brakes would not or should not hold. So that the situation is, as I say, there is an utter absence of proof, failure of proof, that the cause of the accident was the failure to set hand brakes, which, in the exercise of reasonable care by the defendant operating a train with air brakes which were set should have been set. So that the case comes down to either this, I submit, that the plaintiff must establish his case under the doctrine of *res ipsa loquitur* or not at all. For my part, I should be pleased to know if counsel relied on the doctrine of *res ipsa loquitur* or if they conceive that they have established a case under the doctrine of *res ipsa loquitur*.

THE COURT: I haven't been quite able from the beginning to understand upon what theory the plaintiff has tried the case. It would seem to me that she has assumed unnecessary burdens from the beginning. As I understand, it was conceded that the deceased at the time of the accident was a passenger on this railroad train. Therefore the defendant owed to him a high degree of care in protecting him against injury. There is the further well known presumption that in such a case, where a passenger is injured or killed as a result of a collision between trains, the presumption of negli-

gence arises. I don't think it was necessary for the plaintiff to go further than to show that the accident occurred that is, that the death occurred, as the result of the collision, nor was it necessary to introduce the contract under the pleadings. So that the only question is as to whether or not, by doing that, which was unnecessary to do, the plaintiff has exculpated the defendant from the presumed negligence. I do not think the evidence goes that far. In some respects perhaps it tends to, but at the same time it has not gone so far, it has not gone as far as it would have been necessary for the defendant to go if the burden had been assumed by it, as was necessary in a strict trial of the case. It has not been shown that the cars ran away by reason of the interposition of some strange force, either that resulting from an act of God or of a trespasser, a third person. The accident was due to the failure of the defendant to do something which should have been done.

MR. THOMPSON: If you will pardon me,—I do not wish to interrupt you at all, but lest you might have in mind ruling at the end of your remarks, I desire to say, if you had that in mind, that there are three federal cases, two of them, or one at least, of the Ninth Circuit Court of Appeals, that I think Your Honor would be glad to have me read from before you finally rule.

THE COURT: Upon what point?

MR. THOMPSON: On the very point that you have been discussing, as to whether, by the plaintiff having assumed that burden, he was bound to establish it, or whether he might rest on any inference under the circumstances. The Eighth Circuit Court of Appeals announced it quite clearly and definitely and the Ninth adopted it and made it final, and the Eighth reiterated it, all within the past two or three years. The cases are the Great Northern, 251 Federal, 826, Ninth Circuit Court of Appeals—

THE COURT: Perhaps you would better get the cases, because I want to dispose of the motion now, 251 Federal, you say?

MR. THOMPSON: 251 and 246 and 217.

THE COURT: Is 251 the case from the Ninth Circuit?

MR. THOMPSON: Yes, Your Honor. But the argument for it is found in the preceding one,—I think it is 246.

(Mr. Thompson then read from the cases referred to).

THE COURT: It must be admitted, gentlemen, that back of the rule announced in one or two of these cases at least, there are pretty strong reasons. That is, if a plaintiff comes in and alleges specific negligence, there is an implied disclaimer of any other negligence, and the defendant perhaps wouldn't be under the obligation to prepare its case in such a way as to meet all contingencies, in other

words, to discharge its ordinary obligation where the pleading is in the ordinary form, of showing that it used all foresight which was humanly possible, and care, to avoid the accident. I am very seriously doubting whether I can submit the case to the jury upon the theory that I had in mind, that, is, the general theory that the burden was upon the defendant to show that it had done all that was possible to avoid this accident.

MR. THOMPSON: I might suggest to Your Honor, even the complaint having thus specified, and my motion of the established law being as announced, Your Honor's remarks raise the question in my mind at once,—what now should we do, the air brakes having failed, if the burden of proof is upon us? Doesn't it consist of making preparation and a presentation which was wholly unanticipated by us, which was deemed to be unnecessary?

THE COURT: The question is whether you aren't in this dilemma, Mr. Thompson. If it be assumed that the hand or service brakes were not used in this case, as I must for the purpose of this motion, then it would appear that you must take one alternative or the other, either that ordinarily the use of the air brakes is sufficient to avoid an accident of this kind,—I was going to say if you assume further that it was necessary to use some sort of a brake here because the train of cars was upon a grade,—then it must either appear, to exculpate you from the charge of negligence, that gen-

erally speaking, in fact substantially always, the air brakes would have been sufficient and efficient to have prevented this accident. That hasn't been done.

MR. THOMPSON: No. It merely appears that they were set. Sullivan says so. And that there are air brakes.

THE COURT: Yes, one witness testified that the air brakes were set.

MR. THOMPSON: And there is no proof that air brakes properly equipped would not hold. In fact, the proof is to the contrary, so far as there is any proof.

MR. HODGIN: Except the fact, Your Honor, that they didn't hold.

MR. THOMPSON: Yes, and that doesn't make a case for you.

THE COURT: I was going to say, it would seem to me that you must either show that the air brakes ordinarily do hold, and when I say ordinarily, I mean substantially always, if you are going to measure up to the high degree of care that is required to protect passengers from injury, or you must show that the accident in this case occurred by reason of some extraordinary thing that you could not foresee.

MR. THOMPSON: If the doctrine of *res ipsa loquitur* applies, yes.

THE COURT: Applies in your favor, you mean?

MR. THOMPSON: No—applies against us.

THE COURT: Here is a train equipped with hand brakes. Presumably they are to be used for some purpose. So far as appears, the accident could have been avoided by setting the hand brakes.

MR. THOMPSON: And so far as appears, it appears that it could have been avoided by the setting of the air brakes.

THE COURT: It doesn't appear that ordinarily the air brakes would or would not have been sufficient.

MR. THOMPSON: Then may I inquire, in order that the plaintiff may establish his case, if the failure to set hand brakes was negligence and the promimate cause, are they not under the burden of showing that the setting of the air brakes was insufficient, that they alone would not hold?

MR. HODGIN: If the Court please, the fact that the train ran away is the best evidence that the air brakes were not sufficient.

MR. THOMPSON: Yes, but that doesn't prove anything.

THE COURT: No. Of course that is evidence that they didn't hold in this particular case, that is true, but here is a train equipped with two kinds of brakes. The cars are upon a heavy grade. Now it is admitted that you didn't use all of the appliances at hand to prevent the accident.

MR. THOMPSON: It isn't established that they were necessary.

THE COURT: The evidence is pretty meager upon that point, gentlemen, but I can't get away from the thought that if we apply to the defendant the well known rule requiring a high degree of care, I can't get away from the thought that the evidence is sufficient to go to the jury upon that point. It is true that there is no evidence except the mere fact that the train ran away, that the hand brakes were absolutely necessary. The train was supplied with both, and the hand brakes apparently would have given an additional measure of safety. It was entirely possible to use them. There can be no question, therefore, that they would have given an additional measure of safety, and, if so, the highest degree of care possible was not used.

MR. THOMPSON: Well, I could supplement that. Of course I don't like to apply ridiculous—

THE COURT: Of course I know you might say that they could have chained the train to the mountain side; I fancy you are going to say that. But here is a train equipped with two kinds of brakes, a double precaution. I don't know that it is a presumption, of course, that they should be used in all cases of this kind, but as I say, I have difficulty in getting rid of the idea that if you were going to be duly careful of the safety of the passenger, under the circumstances here existing, both should have been used. There is no evidence that the air brake is under the control of anyone

after the train breaks in two; they are set, and they may be released. Now the testimony, inferentially, at least, may be so interpreted as to show that when the train is cut in two, as in this particular case, the air brakes set; whether they always do not appear; there is evidence tending to show that the length of time that they remain set is somewhat uncertain, owing to leakage, as I understand, in the gaskets or the valves, hence there is a question whether or not in the exercise of a high degree of care, under the circumstances existing here, the hand brakes should not have been used.

MR. THOMPSON: It would certainly be upon us of establishing, if the plaintiff had not assumed the burden.

THE COURT: If the pleading were different, there wouldn't be any difficulty about it at all. I think I shall take that view, although I confess with some doubt as to its correctness. It is a close question. I think I shall take it, with the suggestion that, if you desire, I will open the case and permit you to put in testimony upon the point; but anyway I think I shall take that view, and you have that privilege or not, as you desire.

MR. THOMPSON: I regret, Your Honor, that I cannot avail myself of that privilege, owing to the fact that I have assumed from the manner of pleading that the plaintiff would be prepared to try the issue as made, and I have not the means at hand, nor have I made the investigation with the means at

hand of going forward on that theory in the present circumstances.

THE COURT: Yes, I appreciate that possibly you might not be able to do that. However, I think that I shall take that view, and I might consider it later, when I can give more time to it, and grant a new trial if the verdict should be against you. But at present, as I say, I have difficulty in getting away from that view of it—that it is a question for the jury as to whether or not you used the high degree of care required, and that the evidence is at least barely sufficient to require that that question be submitted to the jury, for the reasons I have already explained.

The motion for a directed verdict in favor of the defendant and a dismissal of the action was denied; an exception was taken by defendant's counsel to the ruling of the Court denying defendant's motion for directed verdict and dismissal of the action and was by the Court allowed, and on February 25, 1921, an order was made by the Court allowing thirty days within which to prepare and serve a bill of exceptions.

Thereupon the case was argued and submitted to the jury, and a verdict was rendered in favor of the plaintiff for \$21,250.00, which is of record herein.

The instructions to the jury were upon the theory urged by defendant that by the pleading of specific negligence the plaintiff assumed the burden prov-

ing such negligence, positively or inferentially and that it was not entitled to the benefit of presumption of negligence arising from the mere accident.

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District of Idaho,  
U. S. Circuit.

I hereby certify that the foregoing bill of exceptions contains all the evidence in substance and proceedings given at the trial of the foregoing cause, and in substance all the evidence in the case; and that said bill of exceptions was served, tendered and filed within the time allowed therefor and is now settled, signed and sealed as the bill of exceptions in this case on this 24th day of March, 1921.

FRANK S. DIETRICH,  
*District Judge.*

Endorsed: Filed March 24, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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ORDER EXTENDING TIME FOR SETTLEMENT OF BILL OF EXCEPTIONS.

An application having been made herein by counsel for the defendant, at the close of the evidence, on the trial of the above entitled action, for thirty days within which to prepare, serve and settle a bill of exceptions herein, and said application having been, then and there, by the Court allowed;

IT IS ORDERED that the defendant have, and he hereby is granted thirty days from the date of

trial of the above entitled action, to-wit, to and including March 28th, 1921, within which to prepare, serve, settle and file a bill of exceptions herein.

Dated, Boise, Idaho, March 7, 1921.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed March 7, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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ORDER SUBSTITUTING JAMES C. DAVIS  
AS AGENT.

OF THE GOVERNMENT.

Now, on this 8th day of August, 1921, appeared before me, H. B. Thompson, Esq., of counsel for the defendant, and Charles C. Cavanah, of counsel for the plaintiff, and on motion of counsel for the defendant, it is

ORDERED, that James C. Davis be and he hereby is substituted as Agent of the Government of the United States of America and defendant herein, in place of John Barton Payne, resigned, but that such substitution shall not in any way affect the validity of the judgment in favor of the plaintiffs rendered herein.

FRANK S. DIETRICH,

District Judge.

Endorsed: Filed Aug. 8, 1921.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STIPULATION.

It is hereby stipulated by counsel for the respective parties herein that the Judge of the above entitled Court may certify that the instructions given by the Court at the trial of said cause, as transcribed by the Reporter of said Court, are correct, and the same may be incorporated in and as a part of the record on appeal in the above-entitled cause.

WALTERS, HODGIN & BAILEY,

Twin Falls, Idaho.

C. C. CAVANAH,

Residing at Boise, Idaho.

*Attorneys for Plaintiff.*

GEORGE H. SMITH,

H. B. THOMPSON,

JOHN O. MORAN,

Pocatello, Idaho.

*Attorneys for Defendant.*

Endorsed: Filed Sept. 6, 1921.

W. D. McReynolds, Clerk.

By Pearl E. Zanger, Deputy.

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(Title of Court and Cause.)

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INSTRUCTIONS TO JURY

THE COURT: Gentlemen of the jury, this is a case ordinarily referred to as a death by wrongful act claim, that is, the plaintiff, Mrs. Good, both upon her own behalf and in the name and on behalf of

her young child, asserts that by reason of the pecuniary interest which they had in the life of the deceased, the husband and father, they suffered a damage in his death, that is a pecuniary loss in his death. And they assert that his death was due to the negligence of the defendant, and that, therefore, under the law, the defendant must respond to them in an amount which will compensate them for the pecuniary loss they have thus suffered. Such is the theory of the case.

As has been explained to you, they are the parties upon the one hand, and the government of the United States upon the other. While the railroad system upon which the accident occurred is that of the Oregon Short Line Railroad Company, it is admitted that at the time the accident occurred the trains were being operated by the Government of the United States, and therefore the corporation owning the property is not liable, but under the law the Government is liable, and the action is now against the defendant because, under a provision of a Congressional act by which the railroad systems were turned back to their owners, Mr. Payne is constituted an agent to represent the Government in such suits. I say that much to you in order that you may understand how it is that Mr. Payne is made defendant here. The action is really against the Government, although against Mr. Payne in name.

I hardly need emphasize before you that the fact that the Government is a party defendant should make no difference to you in the consideration of the issues which are presented, either as to whether or not there is a liability or of the amount that should be awarded, if you find the existence of such liability. The defendant here, so far as this suit is concerned, stands upon the same footing as an individual or corporation if such individual or corporation had been in charge of and in the management of the railroad at the time the accident occurred.

Now the first question for you to determine is whether or not the defendant, through his agents in charge of this train, was guilty of negligence, negligence contributing to the casualty or the death of Mr. Good. Generally speaking, the duty of one in charge of a railroad, whether it be the owner or lessee, or, in this case, the Government, and the agencies employed by such owner or one in charge, is to exercise a high degree of care for the safety of passengers who are being carried upon its trains. It is not an ordinary degree of care, but a high degree of care. Under the undisputed evidence in this case, Mr. Good, at the time he was killed, was a passenger, and hence, as such passenger, had the right to demand and to expect of the railroad company, or rather of the men in charge of this train, the exercise of a high degree of care for his safety. As has been explained to you by one of the counsel who have ar-

gued the case, generally speaking carelessness is the failure of a person upon whom a duty rests to exercise such care and foresight as prudent men having due regard for the safety of others and for their own safety, would ordinarily exercise under all the circumstances of the case, or the doing of something by such person which such prudent person would not do in view of all the circumstances of the case. You will see that there is no precise measure or yard stick by which we can determine whether or not certain conduct is careless or not, and it is left to you as jurymen to say whether or not what was done measures up to this general standard of which I have spoken. So here, bearing in mind the duty of persons in charge of this train to exercise a high degree of care for the safety of Mr. Good and any other passengers who may have been upon this train, did they exercise such care and foresight and prudence as men who are ordinarily prudent and careful would have exercised under the circumstances? If they did not they were guilty of negligence, and such negligence, of course, is chargeable to the Government inasmuch as these men were acting as the agents or agencies of the Government in operating the train. If upon the other hand, under all the circumstances of the case, you find that they did exercise such high degree of care as prudent men would under the circumstances have exercised then there was no negligence, and even though an accident oc-

curred the Government would not be responsible. Under the pleadings in this case, gentlemen, and the record, you cannot find negligence merely from the fact that the accident occurred; in other words, you cannot find that the men in charge of the train failed to exercise a degree of care which they should have exercised, merely from the fact that the train ran back and collided with the passenger train. We know that sometimes accidents occur which reasonably prudent men, exercising due care, cannot anticipate or do not anticipate, and hence you cannot find that a man is careless merely because an accident occurs as a result of his failure to do something which he might have done. Of course most of us could have provided against such occurrence if we had merely anticipated that it would occur. So again I say to you that the mere fact that these cars ran down hill would in itself not be sufficient to warrant you in finding that the train men were careless. But you are to consider all of the circumstances in the case. If you find that the train was equipped with both air and hand brakes and the air brakes were set before the train was cut in two or when it was cut in two, and that the hand brakes were not set, and no effort was made to use the hand brakes, you will consider whether or not, in view of the fact that the train was carrying passengers, in view of the fact that apparently it was upon a grade, and in view of the fact that there were air brakes and the air

brakes were set, whether or not, in the exercise of such prudence and foresight as prudent men would have exercised under the circumstances, it was negligence to fail to set the air brakes as an additional precaution against the train or cars running away. If you find that that was the part of reasonably prudent men and it was not performed, then you should find that the defendant was negligent, through its agencies.

MR. HODGIN: Pardon me, Your Honor. You used the expression "air brakes," when I think you meant to say "hand brake."

THE COURT: I used both. I mean to say this: If you find that the train was equipped with both kind of brakes, and that the air brakes were set, and still, notwithstanding that fact, in the light of all of the other circumstances you still think that reasonably prudent men in charge of the train, train men, would have also set the hand brakes, as an additional precaution, and you further find that if such hand brakes, had been set the accident would not have occurred, then you may find that the accident was due to the negligence of the train men. As I tried to explain to you, before you can find they were negligent, you must find that they didn't, under all the circumstances, act as ordinarily prudent men would under like circumstances have acted, in protecting the train against such a possible catastrophe as occurred.

The charge here, gentlemen, in the complaint, is, that the defendant was negligent in that the cars were cut off the train upon this grade and that the hand brakes were not set, so that that is the only particular in which you can find that the defendant was negligent, if you find that it was negligent at all, that is, in cutting off the cars as they were cut off, upon a grade, without setting the hand brakes. The gist of the charge is that it was negligence not to set the hand brakes. You cannot conjecture or surmise that there was other negligence. Unless you find that the train men were negligent in not setting the hand brakes, your verdict must be for the defendant.

Now in the event you find there was no negligence on the part of the train men, causing the accident, your verdict, of course, will be for the defendant. If, upon the other hand, you find that they were negligent in not setting the hand brakes, then it would be your further duty to determine what the pecuniary loss of the plaintiffs has been by reason of the death of the husband and father. As I have already suggested to you, the only loss recoverable in an action of this kind is the pecuniary one. That is, it is the theory of the law that the verdict of the jury shall compensate the plaintiff, or plaintiffs, in this case, for the pecuniary loss thus suffered not at all for mental suffering, distress or grief. The law cannot make compensation for that. But the theory

is that the husband is of some pecuniary—that his life is of some pecuniary value to his wife, and that the life of the father is of some pecuniary value to the child, minor child, and it for this pecuniary loss that the law contemplates a recovery may be had.

You may consider in that connection the value of the services of the deceased to his wife, to his child, what he might have earned. You will consider that out of his earnings it would be necessary for himself to be supported. You will also consider the value of his association both to his wife and his child, the value of his advice and direction and general supervision of their lives and their affairs, and aim to arrive at some amount that will reasonably compensate them. This should be done dispassionately and without sympathy. It would be unsafe for you merely to take a suggestion made in one of the arguments, that the deceased's expectancy was so many years and that he was capable of earning so much, and multiply his expectancy by his earning capacity and award that amount. There are a great many contingencies and conditions to be taken into consideration, and unfortunately there is no such definite or fixed standard. Just what the deceased might have earned had he continued to live, whether he would have continued in good health, or whether he would have become ill, whether he would have earned more or less, we of course can't know to a

certainty. You gentlemen are all men of common sense, and you know how many contingencies there are in life. The young child here may live to the age of twenty-one or it may not. The life of any one of us of course, is uncertain. There is the possibility of re-marriage. All of these things in a way enter into the problem, so that you will see it is not simple problem, and, after all, its solution must be left very largely to the judgment and common sense of twelve men, without any attempt on the part of the Court to lay down any specific rule by which the amount can be computed.

It is suggested that I instruct you, and I do instruct you, although perhaps it isn't necessary, that there can be no thought of punishment in a case of this kind, no punitive damages; that is, you cannot award an amount which you think would punish the defendant for the negligence of its agents. Again I say to you, it is merely compensatory damages, an amount which will compensate the plaintiffs for their pecuniary loss, and nothing else. It should be reasonably adequate for that purpose, but not beyond it. As I have already explained, you should try to reach a conclusion free from any passion or prejudice by reason of the manner of the death of the husband and father.

It is necessary that all of you concur in finding a verdict. Two forms have been prepared. One you will use in case you find for the defendant, and the

other in case you find in favor of the plaintiff, and in the latter is left a blank for the insertion of such amount as you may award.

The bailiff may be sworn.

(Bailiff sworn).

JUROR: Your Honor, would I be permitted to ask a question?

THE COURT: Yes.

JUROR: In case this jury finds that damages are due and compensation allowed, would the jury have any right to decide as to how those damages should be paid; that is, is it to be paid in one sum or separately?

THE COURT: Well, unless I instruct you to the contrary later on, it may be in one sum. I am not at all sure that under the pleadings I can submit that question to you so that you may assume that unless you are instructed to the contrary, it should be in one sum, and in that case it would be for the Court to determine. Any other questions? If not, you may retire with the bailiff.

(The jury retired from the court room in charge of the bailiff).

The foregoing are the instructions given to the jury, September 6, 1921.

FRANK S. DIETRICH,  
*Judge.*

(Title of Court and Cause.)

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PETITION FOR WRIT OF ERROR.

TO THE HONORABLE FRANK S. DIETRICH,  
JUDGE OF THE DISTRICT COURT AFORE-  
SAID:

Now comes the defendant, James C. Davis, as Agent of the Government of the United States of America, by his attorneys, and respectfully shows that on the 25th day of February, 1921, a jury duly empaneled in said cause, found a verdict in favor of the plaintiff and against your petitioner for the sum of \$21,250.00, and upon said verdict a final judgment was entered on the 26th day of February, 1921, against your petitioner, defendant in the above entitled cause, in which verdict and judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prjudice of the defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

That your petitioner is appointed and said judgment rendered against him as Agent of the United States, under the provisions of Sec. 206 of Act of Congress approved February 28, 1920, known as Transportation Act, 1920, and this writ is prosecuted by and for and on behalf of the United States.

Your petitioner feeling himself aggrieved by said verdict and judgment entered thereon as

aforesaid, herewith petitions the Court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States in such cases made and provided.

WHEREFORE, in consideration of the premises, your petitioner prays that a writ of error may be issued in his behalf to the United States Circuit Court of Appeals for the Ninth Circuit aforesaid, sitting at San Francisco, California, in said Circuit, for the correction of the errors complained of and herewith assigned and that the transcript of record, pleadings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals and that an order be made accordingly, and that all further proceedings be suspended until the determination of said writ of error by the Circuit Court of Appeals.

GEO. H. SMITH,  
H. B. THOMPSON,  
JNO. O. MORAN,

*Attorneys for Petitioner in Error.*  
Residence and post office address of  
H. B. Thompson and Jno O. Moran,  
Pocatello, Idaho.

Service of the foregoing peition admitted this  
9th day of August, 1921.

WALTER, HODGIN & BAILEY,  
AND C. C. CAVANAH,  
*Attorneys for Plaintiffs.*

Endorsed: Filed Aug. 9, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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ORDER ALLOWING WRIT OF ERROR.

On this 9th day of August, 1921, came the defendant, by his attorneys, and filed herein and presented to the Court his petition praying for the allowance of a writ of error, and filed herein and presented an assignment of errors intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the said writ of error to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit the judgment heretofore entered in the above entitled cause on the 26th day of February, 1921, in favor of the plaintiff and against the said defendant.

FRANK S. DIETRICH,  
*District Judge.*

Service of the foregoing order admitted this 9th day of August, 1921.

WALTERS, HODGIN & BAILEY,  
AND C. C. CAVANAH,

*Attorneys for Plaintiff.*

Endorsed: Filed Aug. 9, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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### ASSIGNMENT OF ERRORS.

James C. Davis, as Agent of the Government of the United States of America, defendant and plaintiff in error herein, in connection with and as a part of his petition for Writ of Error filed herein, makes the following assignment of errors, which he avers occurred at the trial hereof, as appears from the record herein, and upon which the plaintiff in error relies to reverse the judgment entered herein:

1. The Court erred in overruling the defendant's objection to the following question propounded by plaintiffs' counsel to the witness Ricks:

"I will ask you, Mr. Ricks, whether or not in your judgment it was necessary to have some kind of brakes applied on those cars that were cut off from the train, in order to hold them on the track."

2. The Court erred in overruling the defendant's objection to the following question propounded by plaintiffs' counsel to the witness Ricks:

"What would be the effect on these cars if the air should give way on one car, if the air should leak out on one car, what would be the effect on the others standing on that grade?"

3. The Court erred in overruling the defendant's objection to the following question propounded by plaintiffs' counsel to the witness Ricks:

"If the air failed to work on these cars left standing on the grade there would they stand without the setting of hand brakes" or "whether the cars would stand there really without any brakes applied—in your judgment?"

4. The Court erred in overruling the defendant's objection to the following question propounded by plaintiffs' counsel to the witness Smith:

"If the air brakes failed to work, would it be necessary to set hand brakes?"

5. The Court erred in receiving in evidence, over the objection of defendant's counsel, plaintiffs' exhibits Nos. 3, 4, 5 and 6.

6. The Court erred in overruling and denying the defendant's motion for a directed verdict in favor of the defendant and a dismissal of the action.

7. The Court erred in submitting the case to the jury.

8. The Court erred in giving an entering judgment on the verdict of the jury in favor of the plaintiffs.

9. The evidence is insufficient, under the issues, to support the verdict and judgment.

WHEREFORE, defendant prays that said judgment may be reversed with such directions as may be proper.

JAMES C. DAVIS,  
*As Agent of the Government of  
the United States of America,  
Defendant.*

By

GEO. H. SMITH,  
H. B. THOMPSON,  
JNO. O. MORAN,  
*Attorneys for Defendant  
and Plaintiff in Error.*

Residence and post office address of  
H. B. Thompson and Jno O. Moran,  
Pocatello, Idaho.

Copy received Aug. 9, 1921.

WALTERS, HODGIN & BAILEY,  
AND C. C. CAVANAH,  
*Attorneys for Plaintiff.*

Endorsed: Filed Aug. 9, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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### WRIT OF ERROR.

The President of the United States of America to  
The Honorable Judge of the District Court of the  
United States for the District of Idaho, Southern  
Division—Greeting:

Because in the record and proceedings, as also  
in the rendition of the judgment in a cause pend-  
ing in the District Court before you at the Febru-

ary term, 1921, thereof, between Harriett O. Good, as heir at law of Henry M. Good, deceased, and Henry Max Good, a minor, by Harriett O. Good, his mother and legal representative, plaintiff, against John Barton Payne, (James C. Davis substituted) as Agent of the Government of the United States of America, a manifest error hath happened to the great damage of the said John Barton Payne, as Agent of the Government of the United States of America, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the records and proceedings aforesaid with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit at the Court Rooms of said Court in the City of San Francisco, California, together with this writ, so that you have the same at said place within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held that the records and proceedings aforesaid being inspected, the said Circuit Court of Appeals may further cause to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

Witnesseth, The Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, this 9th day of August, in the year of our Lord one thousand nine hundred twenty-one.

Issued at Boise, Idaho, with the seal of the United States District Court for the District of Idaho, and dated as aforesaid.

W. D. McREYNOLDS,  
*Clerk of the United States District  
Court for the District of Idaho.*

Allowed by (SEAL)

FRANK S. DIETRICH,  
*District Judge.*

Copy received Aug. 9, 1921.

WALTERS, HODGIN & BAILEY  
AND C. C. CAVANAH,  
*Attorneys for Plaintiffs.*

Endorsed: Filed Aug. 10, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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#### CITATION.

The President of the United States of America to Harriett O. Good, as heir at law of Henry M. Good, deceased, and Henry Max Good, a minor, by Harriett O. Good, his mother and legal representative, and to Walters & Hodgins and C. C. Cavanah, her attorneys,—GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Ap-

peals for the Ninth Judicial Circuit to be held in the City of San Francisco, in the State of California, within thirty (30) days from the date of this writ, pursuant to a writ of error filed in the office of the Clerk of the District Court of the United States for the District of Idaho, Southern Division, wherein James C. Davis, as Agent of the Government of the United States of America, is plaintiff in error and you, the said Harriett O. Good, as heir at law of Henry M. Good, deceased, and Henry Max Good, a minor, by Harriett O. Good, his mother and legal representative, are defendants in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable William B. Gilbert, United States Circuit Judge, this 9th day of August, 1921.

FRANK S. DIETRICH,  
*United States District Judge.*

Attest:

W. D. McREYNOLDS,  
*Clerk of Said District Court.*

Service of the within citation admitted this 9th day of August, 1921.

WALTERS, HODGIN & BAILEY  
AND C. C. CAVANAH,  
*Attorneys for Defendants in Error.*

Endorsed: Filed Aug. 10, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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PRAECIPE.

TO THE CLERK OF THE ABOVE ENTITLED  
COURT:

You will please embrace in the record on appeal  
herein the following, to-wit:

Original complaint.

Demurrer to original complaint.

Order sustaining demurrer.

Amended complaint.

Answer of defendant.

Verdict.

Judgment.

Bill of exceptions.

All exhibits offered in evidence.

Order extending time to settle bill of exceptions.

Order substituting James C. Davis as defendant.

Petition for writ of error.

Assignment of errors.

Order allowing writ of error.

Writ of error.

Citation.

Copy of this praecipe.

Return to writ of error.

Dated August 10, 1921.

GEO. H. SMITH,  
H. B. THOMPSON,  
JNO. O. MORAN,  
*Attorneys for Defendant.*

Received Copy Aug. 10, 1921.

WALTERS, HODGIN & BAILEY,  
AND C. C. CAVANAH,  
*Attorneys for Plaintiffs.*

Endorsed: Filed Aug. 10, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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PRAECIPE OF APPELLEES FOR ADDITIONAL  
PARTS OF RECORD.  
TO THE CLERK OF ABOVE ENTITLED  
COURT:

Under and by virtue of Rule 23 of this Court, appellees, Harriett O. Good, as heir at law of Henry M. Good, deceased, and Henry Max Good, a minor, by Harriett O. Good, his mother and legal representative, hereby designate the following additional parts of the record, which they deem material, and request that they be embraced in the record on appeal herein, to-wit:

1. All instructions given by the Court, to the jury, in the above entitled action, at the trial thereof.

Dated this 15th day of August, 1921.

WALTERS, HODGIN & BAILEY,  
C. C. CAVANAH.

*Attorneys for Plaintiffs.*

Endorsed: Filed Aug. 17, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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### RETURN TO WRIT OF ERROR.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

W. D. McREYNOLDS,  
*Clerk.*

Endorsed: Filed Aug. 10, 1921.

W. D. McREYNOLDS, Clerk.

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(Title of Court and Cause.)

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### CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered 1 to 97, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above entitled cause, and that the same, to-

gether constitute the transcript of the record herein, upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the praecipe filed herein by the Plaintiff in Error.

I further certify that cost of record herein amounts to the sum of \$124.80, and that the same has been paid by the Plaintiff in Error.

Witness my hand and the seal of said Court this 17th day of September, 1921.

W. D. McREYNOLDS,

*Clerk.*

(SEAL)

